ruling also provided other interested parties an opportunity to present their points of view and relevant facts in the subsequent phase of the investigation. Consistent with the Commissioner's ruling, Ordering Paragraph 23 of D.90-06-025 incorporated the resellers' switch issue as a Phase III issue (id at 518).

No reseller came forward with a generic switch proposal. However, CSI did provide a specific proposal to be implemented for itself in the San Francisco and in the Los Angeles/San Diego MSAs. Specifically, CSI proposed to install two switches, one in each of the identified markets.

The CSI switch would interconnect with facilities-based carriers' switches. It would also interconnect with the public switched telephone network (PSTN), consisting of the LECs and the interexchange carriers (IEXs) via Type 2A trunk groups<sup>5</sup> and tandem switches in the San Francisco and the greater Los Angeles area. LECs operators' service and emergency services would be available via a Type 1 trunk group.

CSI's switch, with associated data bank, would absorb the number administration, most billing functions, vertical services, call recordation and verification, and routing functions currently being performed by the facilities-based carriers in these MSAs. In addition, CSI would take over responsibility for the interconnection between the facilities-based carriers' MTSOs and the LECs and the IEXs points of presence. All interconnections would be at a "T1" or a higher basis.

CSI presented four witnesses to substantiate the need for a reseller switch. These witnesses testified on the engineering feasibility, technical feasibility, greater availability of innovative service offerings, and the economic justification for a

<sup>5</sup> Direct connections with an LECs tandem office.

reseller switch. The facilities-based carriers countered with their own witnesses who rebutted assertions of CSI's witnesses.

Although CSI intends to take over functions from the facilities-based carriers, it is not clear to what extent this would occur. For example, connections to the PSTN vertical services would be eliminated entirely, according to CSI's Midgley, a communications consultant. However, the facilities-based carriers would need to replace that function with a connection to CSI.

Another example is CSI's call recordation and billing function proposed. Midgley asserted that the facilities-based carriers will be able to substantially reduce their billing records. CSI will not need detailed billing records which currently identify the unit that placed the calls or the length of the calls for the particular units. CSI will only require a bill showing the total accumulated usage of air time.

The facilities-based carriers indicated that some form of detailed billing records, albeit not at the current detail level, will need to be maintained if the proper end user is to be charged and credited for usage adjustments, and we concur that this will result in duplication of some functions.

CSI's witness Widmar testified on the innovative service offerings that cellular subscribers would receive upon the implementation of a reseller switch. Among these innovative services are limited calling areas, incoming call screening, distinctive call signaling, priority call waiting, cellular extension, cellular private branch exchange, cellular centrex, voice mail enhancements, dual-system access, custom directory service, cellular secretary, multi-line hunting, and billing format design.

According to King, president of an economic consulting firm, CSI's switch proposal will provide competition in areas of cellular service where such competition is technically feasible.

Although technical innovations would continue to come from the manufacturers, service innovations would come from resellers such as CSI, currently restricted to "retail activities," that is, the solicitation of end-user customers, the initiation of their service, and the administration of their accounts.

To ensure an equal footing in the cellular switch market, CSI requested that the Commission unbundle wholesale rates, provide resellers the ability to connect with the LECs, and provide resellers with the ability to acquire exchange codes (NXX) from Pacific Bell (Pacific) on the same basis as the facilities-based carriers.

### 10.1 Resellers' Switch Discussion

The reseller switch issue was incorporated into this phase of the investigation at the urging of the resellers so that the resellers could present a detailed account of their switch proposal. During the comment process prior to the workshop, the resellers provided very little in the way of a proposal that the facilities-based carriers could evaluate. Therefore, the facilities-based preworkshop comments listed a series of questions which they felt needed to be answered to determine the feasibility of a reseller switch. At the workshop, CSI responded to the facilities-based carriers' questions. However, CSI still did not provide a sufficient amount of specificity about its switch proposal. The facilities-based carriers were looking for details such as the specific type of switch, the method of interconnection, the manufacturer or size of the switch, the number of connections needed, the type of trunking needed, and whether individual numbers or blocks of numbers are needed for roamers.

The workshop devoted to the reseller switch proposal was productive to the extent that LA Cellular acknowledged that a reseller switch may be technically feasible. LA Cellular invited CSI to present a written proposal for the connection of a specified model switch by specified links to specified LA Cellular locations,

with an identification of all relevant requirements for LA Cellular. DRA and facilities-based carriers, however, concluded that CSI left many questions unanswered including the following: the type of switch, the method of interconnection, the manufacturer or size of the switch, the number of connections needed, the type of trunking needed, and whether individual numbers or blocks of numbers are needed for roamers.

During the workshops Pacific raised the issue of whether cellular resellers should be able to acquire interconnected NXX codes on the same basis as the carriers since cellular resellers are not Part 22 licensees. However, Ordering Paragraph 10 of D.90-06-025 (id at 516) clearly requires interconnection arrangements between cellular carriers and LECs to be offered on a nondiscriminatory basis. There is nothing in the decision that restricts interconnection arrangements to only facilities-based carriers. King testified that CSI is committed to abide by the code utilization rules that apply to all carriers. Therefore, by D.90-06-025, resellers already have the right to interconnection arrangements and NXX codes on the same basis as facilities-based carriers.

The reseller industry did not make a proposal for a generic reseller switch. The only proposal came from CSI and was specifically for CSI. This may be because most resellers do not have access to sufficient funds to purchase a switch. The projected cost ranges from \$1.3 million to \$3.0 million, depending on whether reliance is placed on CSI's estimate or U.S. West's estimate. If this is the case, there may be a very limited reseller switch market, but the number of switches resellers might install is not at issue here.

Nonetheless, we have CSI's switch proposal concept before us for consideration. CSI's proposal relies upon capabilities of switches and switch software that have not yet been developed, tested, or made available on the open market. However, from the

evidence presented in this investigation, it is very apparent that technical innovation is accelerating to the extent that a reseller switch proposal may be technically viable in the very near future. Therefore, consistent with our goal of increasing the competitive forces for cellular service, we will authorize resellers to provide cellular switch facilities and will establish a procedure for resellers to follow.

Those resellers that want to provide switching services currently being provided by facilities-based carriers should file a petition to modify their current certificate of public convenience and necessity (CPCN) to operate as a switch reseller. One purpose in modifying the CPCNs is to eliminate any language in the current CPCNs that prohibits resellers from operating facilities. A second purpose is to ensure compliance with the California Environmental Quality Act (CEQA). As part of its petition to modify, a reseller must comply with Rule 17.1 and include a Proponent's Environmental Assessment (PEA) as part of its filing for review by Commission staff. Resellers are reminded that cellular facilities they wish to install subsequent to that covered in the CPCN modification proceeding are subject to General Order 159.

Resellers will not be required to prove the technical feasibility of their proposed switches, just as the facilities-based carriers are not required to do so when they install a switch. We will rely on market forces and technological advances to influence when resellers decide they are ready to move into the market as switch resellers. Parties obviously disagree as to whether a reseller switch is technically feasible at the present time. While issues of switch incompatibility and protocol converters may exist, we believe that resellers will not invest between \$1.3 million to \$3.0 million to develop and install a reseller switch that cannot communicate with the switches already installed by the facilities-based carriers. The sizable up-front investment required precludes resellers from investing in a switch

until resellers themselves are confident that the reseller switch concept can be successfully implemented.

#### 11. Unbundled Tariffs

Having resolved CSI's interconnection arrangement and NXX concerns, we are left with CSI's unbundled tariff requirement to address. King developed unbundled wholesale rates for the carriers to charge CSI based on what King believed to be the carriers' own costs and what would result in an economically efficient transfer of monopoly profits from the carriers to the general public.

The economic justification for the reseller switch is measurable, according to King, by calculating the incremental cost on a forward-looking basis. King described incremental cost as derived by considering a given growth path for a service over time (ten to 15 years) to perturb the expected growth path by 1% or more, and the increase in present discounted cost over a sufficiently long-time horizon so that all capital and A&G costs become variable.

However, King's unbundled rates were flawed because he relied on "rough estimates" and on technical matters provided by CSI's engineers Midgley, Widmar, and Raney to develop the unbundled rates. Among the deficiencies in King's economic cost analysis were a failure to reflect the additional hardware and software costs to be incurred by the facilities-based carriers to implement CSI's switch proposal, the cost to implement the IS-41 and/or black boxes upon the completion of field tests, and a realistic idea of the functions that the facilities-based carriers would not need to duplicate such as the extent of call and bill details.

Irrespective of CSI's flawed calculations, both CSI and PacTel Cellular's economic witnesses agree that the basis for establishing unbundled wholesale rates should be long-run incremental costs. However, a dispute lies in King's extension of the incremental cost definition to include average cost in those situations where there are no identifiable economies-of-scale such

as in the switching function, and CSI's assertion that resellers not be charged any access fees.

We concur with DRA that the wholesale services being sold on a bundled basis by the facilities-based carriers can be unbundled. Absent unbundled rates, it is difficult, if not impossible, for resellers to assess the viability of a reseller switch. Further, any failure to unbundle wholesale rates runs counter to our Phase I goal of increasing the competitive forces for cellular service and encouraging the most rapid expansion of cellular service and new technology that is reasonably possible.

The facilities-based carriers should be required to unbundle and tariff their wholesale rates into specific subcomponents. The cost methodology recommended in the ALJ 311 decision was incremental cost. However the use of incremental cost methodology was conditioned on all parties agreeing on a concise definition in their 311 comments. Absent any consensus on a definition, parties were ordered to file unbundled tariffs based on direct cost methodology.

The comments and reply comments indicate that although there is general agreement that incremental cost methodology may be the most appropriate methodology, there is certainly no consensus on a standard definition nor even agreement on what constitutes an incremental cost methodology. Hausman (PacTel) for example states that King's (CSI) proposed methodology is not an incremental cost methodology, but a fully allocated cost methodology (1211:2 and Exhibit W-11 pg. 8), yet King's definition was taken word for word from Hausman's testimony in I. 88-11-033, Implementation Rate Design (IRD) for LECs. Part of the problem, as pointed out by PacTel Cellular and GTE Mobilnet in their 311 filings, concerns their unresolved dispute with King's extension of the incremental cost definition to include average cost in those situations where there are no identifiable economies of scale such as in the switching function, and the assertion that resellers not be charged

any access fee. A review of the definitions submitted shows no real agreement on a standard definition as shown in the following examples:

Hausman: For incremental cost, a growth rate over the next 5 to 10 years would be chosen for cellular in a given market, and the present discounted cost of meeting this growth would be estimated. A comparison calculation would then be made with a different and lower growth rate (which could be negative) for the carriers' wholesale customers with the remaining customers buying service from the CSI switch. The comparison of this present discounted cost compared with the first estimated cost divided by the number of customers who buy service from the CSI switch would give an estimate of long run incremental costs. (Exh. W-11 pg. 5)

King: The best way to estimate long-run incremental cost is to consider a given growth path for a service over time, to perturb the expected growth path by 1% or more, and to calculate the increase in present discounted cost over a sufficiently long-time horizon so that all capital costs become variable. A period of 10 to 15 years will usually suffice for the calculation. (Tr. 935.)

LA Cellular: Long run incremental costs (LRIC) are the additional costs the company will incur on a long-run basis because of a new business decision, such as introducing a new service offering or changing an existing tariffed rate. If the new business decision has no impact on the company's existing cost structure, there will be no LRIC incurred by the company. In short LRIC can be defined as the difference between total costs with and without implementation of the new business decision. (311 Comments.)

In addition to the lack of an agreement on a standard definition and methodology for incremental cost, we have other concerns with the incremental cost methodology and definitions being proposed by the various parties in this proceeding. One is the inconsistency of some of those definitions with the standard

economic definition or those from other proceedings. LA Cellular proposes using the adopted definition in Decision 90-11-029 (AT&T's Readyline, Pro Wats and Megacom services). However, we did not adopt a definition for incremental cost in AT&T's proceeding. definition LA Cellular wants us to adopt in the current proceeding is that proposed by DRA in AT&T's proceeding. We only stated in Finding 19 of D.90-11-029 that "all parties in this proceeding, with the exception of U.S. Sprint, agree that some adaptation of LRIC is a proper cost standard for determination of minimum rate levels for services in a competitive market." Setting minimum rate levels (i.e. floors) for unbundled rate elements such as airtime using LRIC may not be fair to the facilities-based carriers in the short run. That is because we stated in D. 90-06-025 that we believe the costs of providing cellular service should drop substantially in the future with the conversion of the analog portions of the network to digital, increasing capacity by three to four times. We will consider incremental definitions, methodologies and quidelines in our IRD proceeding and are not anxious to adopt a definition and methodology in this proceeding that may be unique to the cellular industry. There is not sufficient record or justification for such a determination.

Another concern with using the incremental cost methodology definitions proposed by the various parties is the difficulty of obtaining reliable cost estimates based on uncertain, long-term forecasts. An example is Hausman's definition of incremental cost which not only requires an estimate of cellular growth of customers and usage for each cellular carrier in the cellular market over the next 5 to 10 years, but also the growth rate of the customers and usage of those resellers who choose to be connected to CSI's switch. The cellular market's growth rates, which have been irregular and highly dynamic in the past, would have to include possible effects of new technologies like digital, new services, emergence of possible new competing technologies like

personal communications networks, and the emergence of possible other private competitors like Fleet Call. Even Hausman, on page 5 of his Exhibit W-11, indicates the high uncertainty of forecasting future growth and costs. He also notes (Exhibit O pg. 4) the need to average appropriately among the additional increment of new demand which it will serve, the required lumpy investments to obtain the incremental costs. It is our opinion that use of long-term estimates would be difficult, unreliable and result in a high level of controversy.

For the above reasons, the use of incremental cost methodology for unbundling would in our opinion create a great deal of controversy and result in lengthy delays. The delays would certainly be counter to our afore-mentioned Phase I goal of increasing the competitive forces for cellular services and encouraging the most rapid expansion of cellular service and new technology that is reasonably possible. Therefore, we will adopt the use of direct embedded cost methodology for the unbundling applications. Direct embedded cost methodology has been the costing methodology used in telecommunications utilities for many years. It is well understood, less controversial, and will provide reasonable and fair rates for unbundling the bottleneck wholesale rates. We will adopt the following definition from Decision 91-01-018 for direct embedded costs:

Direct embedded costs include all costs of the company including maintenance expense, capital related expenses including return and income tax and depreciation, administrative costs, other operational expenses such as right to use fees, and wage-related expenses including relief, pension, and Social Security taxes, except some common corporate overheads.

The adoption of direct embedded costs methodology in this particular instance does not foreclose our option to consider incremental cost for unbundling the cellular wholesale access rates in the future. Nor does it indicate a change in our policy and

direction. We believe that incremental costing methodology is normally the most appropriate costing methodology for competitive services, but do not believe it is appropriate for unbundling wholesale tariffs at this time for the reasons discussed above. We have learned in past and ongoing proceedings how long, difficult and controversial proceedings involving incremental cost methodologies can be for telecommunications services. As mentioned previously, we will be reviewing incremental cost methodologies in the IRD proceeding which could provide a standard definition with guidelines that could be applicable to the cellular industry. We will agree, however, to review an incremental cost methodology, in addition to the direct embedded methodology, at hearings on the applications for unbundling the wholesale tariff. conditioned on submission at the time of the application filing of an agreement signed by all parties, on an incremental cost definition and detailed methodology.

For unbundling, the ALJ 311 decision required distinctive subcomponents for air time, billing, interconnections, transmission, and other identifiable service components. Several of the comments in the 311 filings on these components indicate a need for clarification. For example, McCaw Cellular incorrectly interprets transmission to apply only to facilities which currently exist between the cellular switch and the switches of the LEC and IEC, and states the cost study methodology should only be used to determine the cost of unbundled features obviated by the reseller switch.

Our reason for requiring the unbundling of wholesale rates is to promote increased efficiency and innovative use of the cellular network by opening up the network to additional competition. The best method to achieve that goal is to allow competitors to interconnect, on a cost supported basis, to those facilities that only the facilities-based carriers are allowed to provide under FCC rules because of the scarcity of radio frequency

spectrum. We therefore unbundle into wholesale rate elements only those functions that cannot be provided by competitors, that is the portion of the network between the mobile unit and the switch, and certain switching functions. It is that portion of the network that should be cost based, not the portion of the network that will be opened up to competition. We see no need to unbundle wholesale rates into rate elements for services that competitors can provide because we want that portion of the network to be market priced (i.e., the existing wholesale and retail rates).

It is certainly not our intent to get involved in rate based regulation of existing wholesale and retail customer rates. We are only setting up cost-based rate elements on bottleneck facilities for competitors following the FCC concept on open network architecture (ONA), which we believe is appropriate for telecommunications networks. King agrees (Tr. 964) that using the ONA principles on cellular would stimulate maximum innovation and reduce costs to consumers. For example, Pacific Bell is no longer a rate based LEC, yet we ordered them to provide cost-based rate elements to competitors for portions of their network that can't be provided by competition. A recent example is the LEC-provided interconnection rate elements necessary for RTUs to connect their network to the LEC networks in D.91-01-016.

We agree with DRA that the unbundled rates should include a reasonable return to the facilities-based carriers no matter which cost methodology is used. Therefore, in their unbundling applications the facilities-based carriers should use a 14.75% return, which is discussed in Section 9.6 of this decision. This set return will ensure consistency and comparability between the filings of different utilities. Parties who believe a different return should be allowed should justify their proposed returns in their applications on unbundling or in protests to the applications.

In order to reduce the misunderstandings and assure more consistency and uniformity among the application filings, which should reduce the application processing time, we will make the following guidelines applicable:

- 1. Workpapers supporting the cost studies should be made available to interested parties under a nondisclosure agreement at the time of the application filing, and will be protected under the rules of General Order 66-C. Workpapers should be clear, detailed and well organized, with assumptions, cross-referencing, and information resources shown.
- 2. The cost studies should be based on the study year 1993, reflecting the actual operations (e.g., cost levels, volumes, investment level, etc., for 1993). They should include any direct embedded costs that in any way can be identified and attributed by reasonable persons to the provision of the service elements described in 3 below.
- 3. Applications will contain the proposed recurring and nonrecurring tariffed rate elements for the following subcomponents, which can be subdivided into more detailed rate elements if applicants desire:
  - a. Airtime--shall only include on a cost per minute basis all the direct embedded costs of providing the communication channel between the subscriber's mobile telephone and interface at the facilities based switch, including terminal equipment necessary for transmitting, receiving, etc. the channel.
  - b. Interconnection--shall only include a rate element(s) for the direct embedded cost of providing the interface connection to the reseller supplied trunks at the facilities-based carrier's switch.

- element(s) to include the direct embedded costs of providing those functions at the facilities based carrier's switch to recognize the reseller number and route the call to the reseller's trunk, and set up a call coming from a reseller switch to the facilities based carrier's switch. It should include the costs of any protocol or switch modifications.
- d. Billing--shall only include the direct embedded costs of providing summary billing to resellers for the above rate elements.
- 4. It will be assumed that the reseller will purchase its own NXX codes and handle its own number administration and customer services so these related access costs should not be included.

Consistent with our Phase I goal of encouraging the most rapid expansion of cellular service and new technology possible through competition, facilities-based carriers operating in MSAs with resellers should file applications unbundling their wholesale rates within 120 days after the effective date of this order. In recognition of the diversity of cellular service between MSAs and RSAs, the RSAs (and MSAs without existing resellers) should file an application unbundling their wholesale rates within 120 days after the filing date of an application from a reseller proposing to provide switched cellular service within the RSA's service area.

We remind the parties that § 2113 of the Public Utilities Code provides that any violation of any part of any of our orders constitutes contempt of the Commission. Any such violation may be punishable by a fine of up to \$2,000 per day under §§ 2107 and 2108, in addition to contempt penalties.

The facilities-based carriers, in their 311 comments, protested the inclusion of the condition delaying the elimination of the margin requirement until the unbundled rates are in place.

They claim that this condition is unrelated to bundling and is inconsistent with the Phase II decision. We disagree. competition is a key policy in the Phase II decision. This condition, which we adopt, will provide a strong incentive to the facilities-based carriers to implement the unbundled rates quickly which should increase competition in this industry. The condition will also maintain some stability in the marketplace until the resellers have the opportunity to compete. The consequences in the Phase II decision for operating the facilities-based retail arm below cost are not sufficient to eliminate market abuse. It would take over a year before the Commission could start a proceeding to evaluate whether this anti-competitive practice was taking place, and would be of little value to the reseller who was put out of business as a result. Our insistence on introducing added competition quickly is important in that it will allow us to consider further streamlining of our regulatory rules, reducing the regulatory oversight and rules and requirements for cellular service providers.

## 12. Facilities-Based Carriers' Affiliate Operations

By D.84-06-027 of Application 84-03-68, PacTel Mobile Access was denied authority to resell cellular service in the same territory in which Los Angeles SMSA Limited Partnership was authorized to provide resale services. Los Angeles SMSA Limited Partnership's general partner, Los Angeles CGSA was a wholly owned subsidiary of PacTel Mobile Access. This policy of precluding a facilities-based carrier's affiliate from competing with the facilities-based carrier, with the exception of one instance, has remained in effect since the issuance of D.84-06-027 to discourage anticompetitive and cross-subsidization practices.

The exception pertains to PacTel Mobile Services (PTMS), an entity which is owned 100% by PacTel Corporation, the parent of PacTel Cellular. PacTel Cellular in turn, owns approximately 62%

of the equity and 65% voting interest of Bay Area Cellular Telephone Company (BACTC), the Block A carrier in the San Francisco and San Jose market, and which has been allowed to compete in that market pursuant to D.86-05-010.

PacTel Cellular filed A.87-02-017 to obtain Commission approval for its acquisition of an additional interest in BACTC. At the time of the application, PacTel Cellular and its affiliate owned a 47.0 percent interest in BACTC. By the application, PacTel Cellular sought to acquire an additional 14.1 percent interest from Cellular Mobile Systems of the Bay Area, Inc. We previously gave notice in D.86-05-010 when we allowed PTMS and BACTC to compete in the Bay Area of our intent to revisit the issue if PacTel Cellular obtained more than a 47.0 percent interest in BACTC. The assigned ALJ in A.87-02-017 raised the issue during the course of that proceeding and was informed that PTMS would seek the transfer of its Bay Area customers to BACTC or to another entity not affiliated with PacTel Cellular, subject only to BACTC's approval and approval by this Commission.

In D.87-09-028, PacTel Cellular was granted authority to purchase the additional 14.1 percent interest in BACTC and PacTel Cellular was ordered to make a compliance filing within 120 days regarding the proposed transfer of PTMS' customers to BACTC. However, PacTel Cellular's minority partner in BACTC, California Celcom Communications Corp., refused to approve the transfer of PTMS' customers to BACTC. The transfer never took place and PTMS continues to compete with BACTC in the Bay Area.

To resolve the issue of reseller affiliates competing in the same area, A.87-02-017 was consolidated with this investigation.

As part of our current investigation we wanted to assess whether facilities-based carriers' affiliates should continue to be prohibited from reselling in markets where the carrier provides

retail service and to determine if PTMS, which continues to have customers in the Bay Area, is in violation of that policy.

Although the issue of reseller affiliates was addressed in the first phase of this investigation, a question remained as to whether the FCC has preempted us in this matter.

#### 12.1 Workshop Results

At the workshop, parties concurred that FCC policy does not currently preempt us from either continuing our current resell policy or from relaxing the prohibition. All parties, including CRA, recommended a relaxation of the current resale policy, with appropriate cross-subsidization controls in place.

CRA in its comments to the workshop report filed on May 31, 1991 indicated that the policy behind the prohibition on facilities-based carrier affiliate resale is to discourage anticompetitive and cross-subsidization practices.

CRA concurred with the other workshop participants that facilities-based carrier retail affiliate operations could exist if:

- a. They are subject to the same rigorous accounting allocations and obligations on an MSA-by-MSA basis;
- b. They are treated in precisely the same manner as independent resellers without access to switch and other carrier wholesale information unless that information is also provided to independent resellers; and
- c. The facilities-based carrier chooses to have either a retail division or structurally separate affiliate to avoid carrier packing of an MSA by adding multiple retail affiliates with differing rate structures.

However, parties' comments indicate that item (b.) above was seen as difficult or impossible to implement. LA Cellular in its Workshop comments stated that the proposal was impractical. LA

Cellular indicated that one of the economies that could be enjoyed if a reseller affiliate operated in the same market is that existing staff could manage both operations. LA Cellular goes on to state:

There is no practical way that the Commission can monitor information transfers between facilities-based carriers and resale affiliates when the same people perform functions for both.

McCaw indicated that there is no basis to attempt to control information flow between affiliated companies in the cellular business, and indicated that despite any safeguards put in place, information would undeniably be available to the affiliate in any event. The comments concluded that any such restriction would be "unenforceable" and would not serve any legitimate Commission policy.

#### 12.2 Prehearing Conference

At the July 19, 1991 PHC parties concurred that evidentiary hearings were not needed to address the resale issue. Accordingly, the matter was set for briefing at the end of the Phase III hearings.

# 12.3 Facilities-Based Carrier Affiliate Operations Discussion

In the early days of the cellular industry, we recognized the potential for anti-competitive behavior and cross-subsidization between affiliated companies, and thus established this prohibition. While the industry has matured over the past several years, we do not want to change the current policy unless we are certain that it will not be detrimental to competition in this industry.

While the Workshop parties appeared to reach consensus on some issues, that consensus contained enough basic differences to be meaningless. One major area of difference which emerged during the workshops and which continued throughout the remainder of the

proceeding related to CRA's insistence of the need to implement proprietary information safeguards for information flowing from the carrier to its reseller affiliate. Carriers insisted that no amount of safeguards would prevent the flow of information between entities under the same corporate umbrella.

In reviewing the issues in this situation, we are unwilling to make changes to our current policy when the potential for anti-competitive behavior exists. Parties' positions solidified early on, and have not changed much during the course of the proceeding. Also, with the Workshop and various opportunities for briefings, parties have been given an adequate opportunity to make their positions clear on this issue, even in the absence of evidentiary hearings. Therefore, we will continue the current prohibition on an affiliate reseller providing service in the same market where the facilities-based carrier provides retail service.

This brings us to the issue of what to do about PTMS' customers in the Bay Area, where it is operating in competition with BACTC, in which PacTel Cellular has been the majority partner since 1987. We made our intent clear in D.87-09-028 that PTMS' Bay Area customers should be sold to BACTC or some other cellular entity. However, that customer transfer never occurred, and PTMS continues to provide service to customers in competition with BACTC. By this order we are reaffirming our understanding stated in D.87-09-028 that PTMS sell its Bay Area customer base. PTMS by this order is given 120 days to transfer its Bay Area customers either to BACTC or another cellular company. Noncompliance with this order will result in fines under PU Code 2107 for every day that PTMS is not in compliance.

Any customer base transfer, whether in part or in whole, must have Commission approval prior to the transfer occurring.

Approval for the transfer shall be obtained via the advice letter or application process, depending on the circumstances involved.

An application would be required if the transfer results in a

tariff rate increase, more restrictive tariff terms and conditions, a change in conditions of service, or withdrawing service completely.

This order prohibits affiliate resale in the same market. However, we still see the need to monitor affiliate transactions in this industry. On August 11, 1992 we issued a rulemaking in the subject of affiliate transactions which applies to electric, gas and telecommunications utilities, and in R.92-08-008 implemented interim reporting requirements to be followed. This rulemaking was initiated after the close of this proceeding, but since its provisions are applicable to cellular companies, we hereby take official notice of that document, and put cellular companies on notice of the need to comply with the interim reporting requirements delineated in Appendix A to that order.

We are aware of one other instance of a reseller affiliate operating in the same area as its facilities-based carrier affiliate. GTE Mobilnet of California, Inc. (GTEM-CA) is licensed by this Commission as a reseller of cellular telephone service. GTEM-CA is an affiliate of GTE Mobilnet Ltd. which currently provides wholesale and retail cellular service in the greater San Francisco-San Jose areas.

In D.92-05-021, we granted GTEM-CA authority to provide GTEM-CA to offer cellular service, limited to credit card telephones installed in rental cars, public transportation vehicles such as limousines and vans, offshore drilling platforms, and other such similar locations in the same northern California markets in which its affiliated entity, GTE Mobilnet Ltd. currently provides wholesale and retail cellular service. This authority was conditioned on disposition of the affiliate competition issue in this phase of I.88-11-040.

The credit card telephone operations offered by GTEM-CA will make no use of any recording, rating, or other billing related functions provided by GTE Mobilnet Ltd. or its mobile telephone

switching office, nor is there any other commonality of functions between the GTEM-CA credit card operation and GTE Mobilnet Ltd.'s operation. The authority granted was very narrow in scope and could not be perceived to be contrary to the public interest or present realistic opportunities for cross-subsidization or any other anti-competitive practices. Therefore, it is appropriate not to change the authority granted to GTEM-CA in D.92-05-021, provided that GTEM-CA and GTE Mobilnet Ltd. continue to comply with that order, and GTE Mobilnet Ltd. continues to be considered a dominant carrier for purposes of affiliate transaction requirements adopted in R.92-08-008.

#### 13. 311 Comments

The ALJ's proposed decision on this matter was filed with the Docket Office and mailed to all parties of record on June 12, 1992, pursuant to Rule 77 of the Commission's Rules of Practice and Procedure.

Comments from CRA, CSI, DRA, Fresno MSA Limited
Partnership and Contel Cellular of California, Inc., GTE Mobilnet
of California Limited Partnership and GTE Mobilnet of Santa Barbara
Limited Partnership (GTEM), LA Cellular, McCaw, Nationwide Cellular
Service, Inc., PacTel Cellular, and US West were timely filed with
the Docket Office on July 2, 1992.

However, McCaw filed a motion to strike a portion of CRA's comments because CRA's filing exceeded the 25-page limit provided for in Rule 77.3 by 28 pages, and because the 28 pages proposed specific changes to the cost allocation manual which purportedly reflected CRA's position for the first time in this proceeding. McCaw requested that CRA's Modified Appendix C be stricken from the record and that no weight be accorded such comments.

CRA replied that it submitted its Appendix C in response to Rule 77.4 which requires that comments proposing specific changes to the proposed decision shall include supporting findings

of fact and conclusions of law. However, Appendix C was not identified or purported to be findings of fact or conclusions of law. Such findings and conclusions were set forth in CRA's Appendix A.

CRA was on the other side of this 25-page limit issue in the second phase of this investigation. In that phase, CRA filed a motion to strike the appendices attached to LA Cellular's 311 comments, 36 CPUC 2d 464 at 508.

Although we accepted LA Cellular's 311 comments, we granted CRA's motion and rejected the appendices attached to LA Cellular's comments. In rejecting the appendices we stated that although there are no page limits on appendices, Rule 77.3 does not provide for additional comments to be incorporated into appendices. To do so would negate the intent of restricting comments. Appendices are restricted for findings of fact and conclusions of law, id at 509. We also warned all parties that any continuance of this procedure may result in rejection of comments.

Rule 77.3 limits the filing of comments in major generic proceedings, such as in this proceeding, to 25 pages plus a subject index listing the recommended changes to the proposed decision, a table of authorities, and an appendix setting forth findings of fact and conclusions of law. However, in this instance, CRA went beyond the statutory filing requirement. Not only did CRA include 28 pages of additional comments as Appendix C, it crafted a two-page summary of its comments, apparently not detected by McCaw or other parties, within CRA's subject index as pages iii and iv, raising CRA's total comment page count from 53 pages (25 pages of identified comments and 28 pages of Appendix C) to a total of 55 pages, exceeding the allowable comment page count by 30 pages.

Had CRA worked within the legal process and filed a timely motion to extend the comment page limit citing circumstances for the need of an extended page limit, we would have considered such a motion, and upon the demonstration of good cause granted

some relief to the page limit, such as we did in the Southern California Edison and San Diego Gas and Electric Company merger proceeding, D.91-05-028.

CRA's comments goes well beyond the proper legal standard for the filing of 311 comments and does not comport with Rule 77.3's comment and page allowance. CRA is not new to Commission proceedings and should be well versed on our rules. CRA should be admonished for such an inappropriate filing. Absent a timely request and authority for extended comments, we should reject CRA's comments and afford such comments no weight.

However, because we accepted LA Cellular's comments in the prior phase of this proceeding, equal treatment should be afforded CRA to the extent possible. Therefore, CRA's Appendix C should be rejected. This leaves CRA's two-page summary buried in its index and 25 pages of comments that need to be sized down to the allowable 25-page count. Rather than rejecting CRA's remaining 27 pages of comments for failure to follow the rule we will, for this proceeding only, allow the first 25 pages of CRA's comments. This means that CRA's two-page summary and 23 subsequent pages of comments should be accepted. CRA's last two pages of identified comments, pages 24 and 25, should be rejected because they exceed the allowable page count.

On the same motion that McCaw objected to CRA's extended page limit, McCaw objected to CSI's comments regarding events that have developed subsequent to the closing of the record and two partial newspaper/magazine articles attached to CSI's comments as Appendices B and C dated June 1992 and May 1992, respectively. In support of its objection, McCaw cited Rule 77.3 which states that new factual information, untested by cross-examination, shall not be included in comments and shall not be relied on as the basis for assertions made in post-publication comments.

McCaw requested that CSI's Appendices B and C, together with related portions of its comments be stricken. To do otherwise

would, according to McCaw make the hearing process meaningless, because a party could merely ignore the record and submit allegedly accurate and relevant materials after the fact.

Comments, such as CSI's Appendices B and C with related portions of its comments, which provided new factual information, untested by cross-examination were not considered by this Commission pursuant to Rule 77.3.

Comments were also filed by BACTC on July 3, 1992. However, BACTC's comments are rejected because they were not filed within 20 days of the date the ALJ's proposed decision was mailed, pursuant to Rule 77.2, and because BACTC did not request or receive an extension of time to file its comments.

Reply comments from CRA, CSI, DRA, GTE Mobilnet of California Limited Partnership, and GTEM, LA Cellular, McCaw, National Cellular Services, Inc., and PacTel Cellular were timely filed with the Docket Office.

We have carefully reviewed the comments and reply comments filed by the parties to this proceeding that focused on factual, legal or technical errors in the proposed decision and in citing such errors made specific references to the record, pursuant to Rule 77.3. To the extent that these comments and reply comments required discussion, or changes to the proposed decision, the discussion or changes have been incorporated into the body of this order. Comments and reply comments which merely reargued positions taken in briefs were not considered.

#### **Findings** of Fact

- 1. A majority of RSAs permit holders had received their operating authority prior to the second PHC.
- 2. The establishment of a streamlined certification process for RSAs facilities-based carriers is moot.
- 3. It is proper public policy to forebear from any rate of return or profit-based regulation of cellular wholesalers that are pricing their services competitively.

- 4. We will not adopt reporting requirements for the assessment and monitoring of cellular capacity utilization and capacity expansion at this time.
- 5. The Commission is not required to take official notice of documents.
- 6. Rule 74 explicitly provides that official notice may be taken of such matters as may be judicially noticed by the courts of the State of California.
- 7. We affirm the ALJ's March 6, 1992 ruling denying CRA's request that official notice be taken of a Commission's Legal Division memo dated December 16, 1991 and that official notice be taken of GTE Mobilnet of California Limited Partnership's annual reports for 1989 and 1990.
- 8. The purpose of the modified USOA will be to attempt to police predatory pricing.
- 9. The USOA is the appropriate tool to determine the facilities-based carriers' cost to provide wholesale and retail services.
- 10. The existing USOA is not in a form conducive to segregating retail, wholesale and noncellular activities in order to make a retail break-even analysis.
- 11. Costs incurred by a carrier due to its offering of wholesale service should be properly allocated or assigned in their entirety to the wholesale side if those costs could not be avoided if the carrier discontinued retail service.
- 12. If a carrier's retail operations are covering all of the costs directly associated with that business, then the carrier is not cross-subsidizing retail out of wholesale revenues or earnings.
- 13. Costs exclusively incurred for retail operations of a carrier should be allocated directly as a retail cost, costs exclusively incurred for wholesale operations should be allocated directly as a wholesale cost, and costs that are shared between